IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1899.

NO. 50.

S. ENDICOTT PEABODY,
Appellant,
vs.
UNITED STATES.

REPLY BRIEF OF APPELLANT.

There are three things which are urged in the brief of the government in this case which require some answer from the appellant. These are:

First, That the act of juridical possession does not belong to the Spanish archives now in the office of the Surveyor General of New Mexico.

Second, That in 1824 there was no power in any officer in New Mexico to make a grant.

Third, That this case is controlled by the decision of this court in the San Miguel del Bado case.

I.

THE ACT OF JURIDICAL POSSESSION IS ONE OF THE SPANISH ARCHIVES.

The strongest argument made by counsel for the government against this paper being one of the Spanish archives is that it does not bear any archive number, like the two other papers which are numbered 898 in red ink. An examination of the original paper will show that three-fourths of the second half of the paper are missing, and it would be upon this portion of the paper, if anywhere, that the number 898 would naturally appear. It is to be borne in mind that in selecting and marking the archives which related to lands, at the time of the organization of the office of the Surveyor General in 1855, a number of papers in many cases were included under one number and put in one case or cover; and the list made and reported to Congress is practically no guide as to what is covered by each number. It is not true, however, that in all instances the red ink number was put upon each paper in a case or cover. In the present case it appears from the statement in the brief for the government that the number 898 on one of the papers as to which no question is made, appears to have been traced over pencil marks, and that Mr. Tipton is of opinion that the penciled number is in the hand writing of Mr. Whiting, the chief clerk in 1855. It is evident that the fact that this paper does not now bear the archive number can not be considered as conclusive against it. The translation of the muniments of title, made and sworn to by Samuel Ellison on the 20th day of May, 1875, includes the two documents which counsel for the United States concede to be archives, and also the act of possession, which could only be proper if the three belonged together and constituted archive

numbered 898; and it is to be further noted that this translation is certified by the official translator of the office of the Surveyor General to have been compared with its original in Spanish and found correct. This certificate appears to recognize that the three papers formed one single document in the archives of the office. It is also to be noted that the other paper, purporting to be a list of the individuals comprised in the grant, and which was undoubtedly presented to the Surveyor General by Ellison in 1875, is not in its translation made to form a part of the archive papers, but is translated, verified and certified separately.

No positive, direct evidence is presented on behalf of the government to show that the act of possession first came into the office of the Surveyor General in 1875. If it were the fact that that paper was then filed there for the first time, it is incredible that evidence does not exist of the fact, occurring as it did at a comparatively recent date; and it is no more than a just compliment to the energy and industry of the attorney who represents the United States in the court of private land claims, and of his numerous, efficient and accomplished assistants, to say that if any such evidence had been in existence, it would have been produced upon the trial of this cause. Failure to produce such evidence ought to be considered clear proof that it does not exist.

It is respectfully submitted that all the indications are in favor of the position taken in appellant's original brief that this paper formed a part of the Spanish archives.

II.

IN FEBRUARY, 1824, THE GOVERNOR OF NEW MEXICO HAD POWER TO MAKE GRANTS.

It is a general rule of international law that, upon a change of sovereignty, the general body of laws

remains in force until changed or repealed by the new sovereign. Counsel for the government clearly recognize this doctrine and the necessity for meeting it, as they urge that the imperial colonization law of January 4, 1823, operated as a repeal of all former laws for the disposition of vacant public lands. There is nothing in the law itself to support this assumption. An examination of that law will show that it was intended only to regulate the colonization of public lands by foreigners. With the exception of article eighteen, no word can be found in the whole of the law applicable to any one but foreigners, and it is clear that the statement in article eighteen that preference shall be given to the natives of the country in the distribution of lands, is separable from the rest of the law and was put in as a matter of precaution, so that foreigners could not be allowed to crowd out the native citizens or to obtain any undue advantage under the provisions of this law enacted for their benefit, Clearly, therefore, it cannot be considered as having displaced former laws as to the granting of public lands to native citizens of the country.

Reynolds' Compilation, 100.

Moreover, on the 8th of April, 1823, the Congress of Mexico declared that all acts of the imperial government from the 19th of May, 1822, to March 29, 1823, were illegal.

Reynolds' Compilation, 107.

Even if it should be conceded that this colonization law operated to repeal all existing laws on the subject of disposition of public lands, the repeal of that repealing act would undoubtedly revive the pre-existing laws.

It should be borne in mind also that by the plan of Iguala, proclaimed on the 24th of February, 1821, and by the plan of Vera Cruz on the 6th of December, 1822, the doctrine as to the continuance of former laws and of all public officials with their powers, was distinctly declared in unmistakable terms.

The correctness of the position here taken has been distinctly recognized by this court in a very recent decision which has already been cited in appellant's original brief.

Ely vs. U. S. 171 U. S., 228 to 231.

It is suggested in the brief on behalf of the government that there was some extraordinary unexplained delay in the delivery of juridical possession by the alcalde. Attention is called to the fact that the act of possession does not disclose the day upon which possession was delivered, and that its date at a place many miles distant from the land in question is no guide as to when the possession was actually delivered; and we must conclude that the possession was delivered within a reasonable time after the making of the order by the governor.

III.

THIS CASE DOES NOT FALL WITHIN THE RULE LAID DOWN IN RECENT DECISIONS OF THIS COURT AS TO COMMUNITY GRANTS.

It is contended by the government that this case is substantially the same as that of the grant known as the San Miguel del Bado.

U. S. vs. Sandoval, 167 U. S., 278.

It is asserted that, in this case as in the other, a list of the grantees was made out after the posses-

sion was delivered. In the former case the list referred to was made nine years after the grant by an alcalde who acted under the specific instructions of the governor and dated and signed his certificate and also certified the list of lot holders. In the present case the paper presented as a list is undated, unsigned, full of erasures and alterations, not in the same hand writing as the act of possession, so that it discredits itself upon its face.

This, however, may be unimportant, because even in the absence of any list to identify the grantees, their rights could still be preserved by the form of confirmation or be enforced after confirmation by appropriate proceedings in courts of ordinary jurisdiction. In the case above cited, at page 295, will be found stated the grounds upon which the decision of the court is put. It is there declared that the papers show an intention that a town should be, and it was, established; that the land asked for was intended not only for the first petitioners, but also for every one in the province not supplied, and that the conditions set out by the alcalde in his report, as agreed to by all the petitioners, contained the provision that the tract was to "be in common not only in regard to themselves, but also to all the settlers who may join them in the future."

Similar language is used in the papers of the Cañon de Chama grant, as is shown in the opinion of the court, that case being also cited by the government.

Rio Arriba Company vs. U. S., 167 U. S., 307.

In view of these provisions the court held that the title to the unallotted lands was reserved to the government and passed to the United States upon the cession of the country. In the present case no similar language can be found in the order of the

governor or in the act of possession, and obviously this case does not stand on the same footing as the grants passed upon in the two cases above cited.

To show the correctness of our position that some evidence in the grant itself must be found in order to justify such a decision as was made in the above cited cases, the attention of the court is called to the fact that the archives of the former governments show a number of instances where, in disputes as to matters of boundary, the ownership of grantees to the full extent of the out-boundaries has been sustained in cases where there also had been allotments in severalty to the grantees. A striking instance of this kind is to be found in connection with what is commonly known as the Bernabé Montaño grant, or the grant of the settlers of the Rio Puerco. This is cited here for the reason that the papers relating to it can be readily examined, having been printed in Congressional documents. The papers concerning the Montaño grant can be found in *Ex. Doc. 106, House of Representatives, 41st Congress, 3rd Session.* It will be seen that in this grant the governor declared that the land should be distributed to the settlers and that the families to whom land was so given only would have title to the particular tracts so assigned. Directions were given for the giving of building lots in such form that a compact settlement should be formed, easily defended against the savage Indians. The act of possession shows in detail the assignment to each settler of land for a house lot and of other land for purposes of agriculture, each of the last kind being 300 varas in length by 100 varas in width. Certain natural objects were given as out-boundaries, but a limitation was placed upon the extent of the land by a statement of the number of leagues in which it could extend in each direction. One of the settlers it appears attempted

to do away with this limitation by erasing the statement as to the distances, and the matter having been brought to the attention of the governor, he declared specifically that the leagues given, and not the natural objects, should govern the extent of the land.

Some years later Luis Jaramillo petitioned for land lying to the west of the Montaño grant, and the governor made the grant and directed Antonio Sedillo, chief alcalde of Laguna, to deliver possession. The alcalde in August, 1769, having summoned the adjoining settlers to appear to show whether there were any obstacle to the delivery of possession, reported that the settlers on the Montaño grant insisted that they would be greatly injured and prejudiced by the delivery of the land asked by Jaramillo, and the matter then came before the governor for his action. The governor directed the alcalde to proceed to the Montaño grant settlement and measure off to the westward one league and a half, as given in the grant, and at that place erect a land mark, and notify the settlers that that was the extent of their land, and then deliver to Jaramillo possession of the land granted to him. There is no hint anywhere in these proceedings by any one that the title of the Montaño grant settlers was limited to the lots of land given to them in severalty, but on the contrary there is distinct recognition by the governor of their absolute property right to the full extent of the land granted by his predecessor to a great distance beyond the small allotments of agricultural land. Had there been any idea at that time that the title to the unallotted land remained in the government and could be disposed of at the pleasure of the governor, it would undoubtedly have been asserted, especially in view of the fact that the governor appears to have regarded the settlers on the Montaño grant with well-founded dislike on account of their unlawful at-

tempts to enlarge the boundaries of their land, and expresses himself with great severity toward them. The papers in the Luis Jaramillo case will be found at pages 98 to 104 of *Ex. Doc. Number 62, House of Representatives, 43rd Congress, 2nd Session.*

A comparison of the grant papers in the Montaño case and in the present case will show that there would be much more reason for holding applicable to the former grant the rule laid down by this court in the cases of the San Miguel del Bado and the Cañon de Chama grants than there possibly can be for applying it to the present case; and yet, as we have shown, no such idea was entertained by the chief officer of the province of New Mexico in 1769, an officer who appears to have united in himself practically all judicial as well as executive functions.

It is respectfully submitted that no sufficient reason has been sbown on behalf of the government why the claim for this grant should not be sustained and a confirmation given which will inure to the benefit of all heirs and legal representatives of José Rafael Samora and his associates.

F. W. CLANCY,
Counsel for Appellant.